IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1544

DOUGLAS K. KNUTSON, ARLEN N. BENHAM, GEOFFREY BEATY, LAURA DUARTE, EVAN FRANCIS WILLIAMS, JOSEPH W. BERTHIAUME, KENNETH W. JACKSON, JEAN E. NYLAND, DANIEL A. DUTRA, WILLARD B. KITTREDGE, ROBERT A. DUTRA,

Petitioners,

vs.

THE DAILY REVIEW, INC., a corporation, BAY AREA PUBLISHING CO., a corporation, FLOYD L. SPARKS, an individual, WILLIAM CHILCOTE, an individual, DALLAS CLELAND, an individual, JOHN CLARK, an individual, CARL FELDER, individually and doing business as Felder Enterprises,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

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BRIEF OF RESPONDENTS IN OPPOSITION

Respondents, The Daily Review, Inc., *et al.*, (defendants below) respectfully pray that the Petition for a Writ of Certiorari (No. 76-1544) filed May 7, 1977 by Douglas K. Knutson, *et al.*, and received by counsel for respondents on May 9, 1977, be denied.

QUESTION PRESENTED

Stripped of argumentative assertions, the sole question raised by this Petition appears to be:

Should this Court review and reverse the findings of the trial court, unanimously affirmed by the Court of Appeals that

a.) The termination of petitioners' distribution agreements neither violated Section 1 of the Sherman Act (15 U.S.C. §1) nor gave rise to a viable claim for damages under Section 4 of the Clayton Act (15 U.S.C. §15); and

b.) The Argus petitioners suffered a complete failure of proof on the *fact* of damage issue.

STATEMENT OF THE CASE

This Petition seeks further review of the trial court's findings of fact in a private antitrust suit seeking damages and injunctive relief under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§15 and 26). Petitioners (plaintiffs below) are a group of wholesale distributors of two suburban newspapers published by the corporate respondent, The Daily Review, Inc. ("D.R.I."). The individual respondents are management officials of D.R.I. The Complaint, filed in August 1973, alleged several violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2), arising in the context of a newspaper distribution system using independent contractors for wholesale distribution and its replacement by a system using company employees.

The case was assigned to the Honorable Charles B. Renfrew, United States District Judge for the Northern District of California. Judge Renfrew presided over a non-jury trial which consumed 28 trial days and generated a Reporter's Transcript exceeding 4,000 pages in length. At the conclusion of that trial Judge Renfrew rendered an 83 page Opinion (Appendix B to the Petition) addressing every issue raised in this case.

Germane to the instant Petition, Judge Renfrew found that while the distributor agreements between the plaintiffs and D.R.I. contained a resale price provision violative of the Sherman Act, the conversion of the wholesale distribution of defendants' newspapers from independent contractors to company employees terminated rather than perpetuated that restraint. The conversion was therefore lawful under the antitrust laws and could not support a viable claim for damages:

> "Rather than being 'pursuant to or in furtherance of' defendants' resale price fixing agreement, however, the terminations here were clearly undertaken for the purpose of bringing an end to defendants' antitrust violation by means of a complete change to a new and lawful distribution system. There simply is no evidence of any continuing violation which these terminations could be said to be 'pursuant to or in furtherance of'. Defendants' new contracts with carriers contain no mention of resale price, and there is no credible evidence that defendants have coerced the carriers into charging the suggested resale price. . . . *the violation does not become a 'substantial factor' in bringing about plaintiff's terminations when defendants act solely to bring their business within the antitrust laws and to avoid further perpetuation of their wrongdoing.* Plaintiffs cite

no authority to the contrary. Thus plaintiffs have failed to establish that their terminations as independent dealers were a proximate result, within the meaning of §4 of the Clayton Act, of the price fixing violation." (Appendix B at 127-128; footnote omitted, emphasis added).

The considered nature of this finding is demonstrated by the trial court's meticulous analysis of each piece of evidence and each argument raised by the petitioners in their Petition to this Court. (See Appendix B at 64-87).

The finding that the termination of the plaintiffs' distribution agreements and the conversion of the system of distribution was not in furtherance of the resale price violation was unanimously affirmed by the Court of Appeals. In responding to the claims petitioners make before this Court, the Ninth Circuit stated:

> "As to the second price restraint, that on the retail price to subscribers, plaintiffs claim that the terminations were used to foster an anticompetitive scheme. They argue that Sparks eliminated the distributors so his newspapers could influence directly the prices charged by the carriers and the remaining adult independents (motor route, retail account, and street sale dealers). . . .
>
> "While the uncontested facts demonstrate Sparks' unalloyed intent to establish uniform prices for his newspapers, the totality of his actions does not amount to the requisite quantum of coercion: no 'meaningful event depend[ed] on compliance or noncompliance' with his requests

> of the carriers. *(Butera v. Sun Oil Co.* (1st Cir. 1974) 496 F.2d 434, 437.)
>
> * * * * *
>
> "Plaintiffs have thus failed to show coercion of the remaining independents and have, therefore, not proven that the terminations were in furtherance of a retail price-fixing scheme." (Appendix A to the Petition at 16-19).

The Court of Appeals also unanimously affirmed the trial court's ruling that because the terminations were lawful, no viable damage claim could be made in the following language:

> "They [the plaintiffs] also claimed loss of the going concern value of their dealerships and sought an injunction to enable them to continue in business. Since, as the district court found (383 F.Supp. 1384-89) and we affirm, the terminations, pursuant to a valid contract, were legal and did not further an antitrust violation, the plaintiffs were not entitled to any damages . . ." (Appendix A at 28).

REASONS FOR DENYING THE PETITION

The instant Petition should be denied because the lower courts properly applied well established principles of antitrust law to findings of fact made by the trial court and unanimously affirmed by the Court of Appeals. The Petition raises no legal issue worthy of the Court's attention, and no legitimate antitrust policy warrants award of windfall treble damages for the lawful conversion of a distribution system to bring

it into compliance with, rather than violation of, federal antitrust policies.

THE COURTS BELOW PROPERLY CONSTRUED AND APPLIED THIS COURT'S DECISIONS

Both the trial court and the Court of Appeals properly ruled that the termination of the distributor agreements violated the Sherman Act only if it furthered or perpetuated a violation of that law. This rule is an application of this Court's rulings that a manufacturer of a product, for which substitutes are readily available, is free to select his customers without violating the antitrust laws [*United States v. Colgate & Co.*, 250 U.S. 300 (1919); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1962); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, at 376 (1967)], and that vertical integration is not unlawful unless the effect is to unreasonably restrict the opportunities of competitiors to market their products [*United State v. Columbia Steel Co.*, 334 U.S. 495, at 524-526 (1948)].

Due to the plaintiffs' failure of proof that the conversion was either motivated by a purpose, or had the effect, of unreasonably restraining trade or commerce, the lower courts properly held the terminations to be lawful and just as properly denied the plaintiffs' claims for damages allegedly flowing from the terminations. Any injury suffered through the termination resulted from actions in compliance with, rather than violation of, the Sherman Act. An award of damages therefor, due to the existence of the earlier pric-

ing provision, would have nothing to do with the aspect of vertical resale price maintenance which renders it unlawful. As this Court unanimously held in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, ... U.S. ....., 50 L.Ed.2d 701 (1977) proof of more than a mere causal relationship between financial "injury" and the existence of unlawful conduct is required to support an award of damages under Section 4 of the Clayton Act:

> ". . . it is quite clear that if respondents were injured, it was not 'by reason of anything forbidden in the antitrust laws': while respondents' loss occurred 'by reason of' the unlawful acquisitions, it did not occur 'by reason of' that which made the acquisition unlawful.
>
> "We therefore hold that for plaintiffs to recover treble damages on account of §7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendents' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violation . . . would be likely to cause.' *Zenith Radio Corp. v. Hazeltine Research, Inc., supra,* 395 US at 125, 23 L Ed 2d 129, 89 S.Ct. 1562." (..... U.S. .....; 50 L.Ed. 2d at 712; footnote omitted).

On the record made in this case, and the findings of fact made and affirmed by the courts below, the alleged

injury from the conversion of D.R.I.'s system of distribution does not reflect either the anticompetitive effect of the violation or of anticompetitive acts made possible by the violation. Damages under Section 4 of the Clayton Act consequently cannot be lawfully awarded.

THE FACTUAL ISSUES RAISED BY THE PETITION DO NOT MERIT REEXAMINATION BY THIS COURT

The Petitioners' claims have been rejected by the trial court and twice by the three judges constituting the panel of the Court of Appeals which heard this case, once on their initial decision and again on petition for rehearing. Examination of the opinions of both of the lower courts provides the basis for a conclusive negative answer to the questions presented by the Petition, and which merely reargue the evidence in this case. Nothing in the Petition shows a need for this Court to devote any of its severly limited time to reexamination of the unanimous judgment of all of these judges on these issues.

To challenge this unanimity, Petitioners assert that the Court of Appeals "refused to consider the evidence" concerning alleged efforts to control resale prices after the termination (Petition at 19). The portion of that court's opinion quoted at pages 4-5 above, however, demonstrates that the Court of Appeals did consider that evidence. Furthermore, even if there were not an express reference to the plaintiffs' claims, this Court should not assume that the lower courts failed to consider it. *Bouldin v. Holman,*

394 U.S. 478, at 479 (1959). And as this Court held in *Gutierrez v. Waterman S.S. Corp.,* 373 U.S. 206 (1963), the credibility of the witnesses and of the evidence is properly determined by the trial court rather than appellate courts. In the instant case, as in *Gutierrez,* the finder of fact refused to believe the plaintiffs' evidence or to draw the inferences and conclusions which plaintiffs contend are supported by the evidence.

The "two-court" rule applied by this Court mandates denial of this Petition. See *Berenyi v. Immigration Service,* 385 U.S. 630, at 635-636 (1967); *Comstock v. Group of Institutional Investors,* 335 U.S. 211 (1948); *Allen v. Trust Company of Georgia,* 326 U.S. 630, at 636 (1946): "Here two courts have resolved that question of fact in favor of respondents . . . . Those findings, being concurrent findings of the two lower courts, will be accepted here without reexamination." The justification for this rule was expressed by Justices Brennan, Douglas and Stewart in their concurring and dissenting opinion in *Neil v. Biggers,* 409 U.S. 188, at 203 (1972):

> "The 'two-court' rule, however, rests upon more than mere deference to the trier of fact who has a firsthand opportunity to observe the testimony and to gauge the credibility of witnesses. For the rule also serves as an indispensable judicial 'time-saver,' making it unnecessary for this Court to waste scarce time and resources on minor factual questions which have already been accorded consideration by two federal courts and whose resolution is without significance except to the parties immediately involved."

In the instant case, both deference to the lower courts' factual findings and recognition of the scarcity of time and resources of this Court require rejection of the instant Petition.

CONCLUSION

For the reasons stated, this Petition should be denied.

Dated, June 6, 1977 at San Francisco, California.

Respectfully submitted,

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